

November 18, 1982



SECY-82-457

ADJUDICATORY ISSUE

Affirmation)

For: The Commissioners

From: Leonard Bickwit, Jr., General Counsel

Subject: REVIEW OF ALAB-687 (IN THE MATTER OF
DUKE POWER COMPANY, ET AL.)

Facility: Catawba Nuclear Station, Units 1 and 2

Petitions for
Review: None 1/

Review Time
Expires: December 3, 1982, as extended.

Purpose: To inform the Commission of an Appeal
Board decision on admitting late con-
tentions [which, in our opinion, Ex 5

1/ The matter came before the Appeal Board as a Board referral. A petition for review of an Appeal Board decision on an issue referred to it from a Licensing Board is not authorized by the Commission rules, 10 CFR § 2.786(b). Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-77-23, 6 NRC 455 (1977); Offshore Power Systems (Floating Nuclear Power Plants), ALAB-500, 8 NRC 323 (1978). Thus no petition would be expected and the parties are free to raise the issue later on Commission review of the merits decision.

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Information in this record was deleted
in accordance with the Freedom of Information
Act, exemptions 5
FOIA: 92-436

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5/40

Discussion:

1. Summary

In ALAB-687, the Appeal Board held that timely but non-specific contentions could not be admitted conditionally but that the lateness criteria in 10 CFR 2.714(a) were automatically satisfied for adequately specific late-filed contentions based on information that was not required to be prepared early enough for timely submittal of contentions. In so holding, the Appeal Board remanded for reconsideration three Licensing Board rulings that conditionally admitted to the proceeding certain timely submitted contentions notwithstanding the Licensing Board's determination that the contentions did not satisfy the specificity requirements of 10 CFR 2.714(b). The Licensing Board's rulings had been based on the nonexistence or public unavailability of information necessary for the adequate framing of contentions. The Appeal Board concluded that a licensing board is not authorized to admit conditionally, for any reason, a contention that does not meet the reasonable specificity requirements. However, the Appeal Board determined that if contentions are filed late because the Commission does not require the relevant documents to be in existence or publicly available when a hearing begins, then the hearing rights established by section 189a. of the Atomic Energy Act of 1954, as amended, require the Licensing Board to find that good cause for filing late automatically overrides the other late-filing criteria of 10 CFR § 2.714(a) if such contentions are submitted within a reasonable time after the documents become available. —
[Although we believe that

EX. 5

our opinion,

In

we believe that

balance, that

we recommend, on

2. Procedural Background

This matter arose from the Licensing Board's consideration of 52 contentions

filed by three organizations. 3/ All but two of the 52 contentions were opposed by either the applicants 4/ or the staff, principally for an alleged lack of specificity. The Licensing Board admitted one Palmetto contention, finding that it met the specificity requirements of 10 CFR § 2.714. 5/ However, the Licensing Board also admitted 10 contentions advanced by CESH and Palmetto, notwithstanding the Board's determination that the contentions did not satisfy the specificity requirements of 10 CFR 2.714(b).

3/ The Carolina Environmental Study Group (CESG) filed 19 contentions; Palmetto Alliance (Palmetto) filed 29 contentions, and the Charlotte-Mecklenburg Environmental Coalition filed 4 contentions. Palmetto also filed an additional 19 contentions identical to CESG's 19. CESG also filed three paragraphs labeled as contentions but which the Licensing Board viewed as procedural requests.

4/ Duke Power Company, North Carolina Municipal Power Agency Number 1, North Carolina Electric Membership Corporation and Saluda River Electric Cooperative, Inc.

5/ The admission of this contention is not presently in issue. As a result, under long-standing Commission practice, Palmetto has been admitted as a party and a hearing must be held to consider the Palmetto contention.

Applicants and staff objected to the Licensing Board's rulings. ^{6/} The Licensing Board overruled the objections, but nevertheless referred those rulings to the Appeal Board for interlocutory review pursuant to 10 CFR § 2.730(f). The Appeal Board accepted the referral and ruled on the issues in ALAB-687 as described above.

3. Licensing Board Decision

The Licensing Board admitted 10 contentions conditionally, on the basis of the nonexistence or public unavailability of information, and required the petitioners to provide the requisite specificity and basis for contentions no later than 30 days after the receipt of the relevant documents.

-
- ^{6/}
- (1) The Board's conditional admission, absent the specificity required by 10 CFR § 2.714, of 10 contentions based on the unavailability of Staff or Applicant documents which might allow the further particularization of the contentions. These contentions were admitted subject to further specification after pertinent documents become available, but the Board ruled that the late-filing criteria of 10 CFR § 2.714(a) would not be applied.
 - (2) The Board's conditional admission of six relatively vague contentions, subject to the provision of greater specificity after completion of discovery.
 - (3) The Board's ruling that the late-filing criteria of 10 CFR § 2.714(a) do not apply to contentions based on information or analysis in documents not previously available and filed promptly after such documents are issued.

The Licensing Board observed that although the specificity requirement of 10 CFR § 2.714 is "a perfectly reasonable one, so long as the factual information necessary for specificity is available to an intervenor," the information necessary for specificity is often not available in the early stages of the proceeding. March 5 Order, at 5. Under such circumstances, the Licensing Board found that intervenors need not comply with the specificity requirement of 10 CFR § 2.714. Rather, "[t]he most [an Intervenor] should be required to do at this point is express an interest in the subject." March 5 Order, p. 17. In the Board's view, contentions can be admitted conditionally at the first prehearing conference based merely on such an expression of interest, subject to a later demonstration of the requisite specificity after all final documents (e.g., applicants' final submittals demonstrating compliance with applicable regulatory requirements, the NRC staff's Safety Evaluation Report and the Draft Environmental Impact Statement, and the ACRS letter) have been completed. March 5 Order, pp. 7, 11-12.

The Licensing Board further held that the late-filing criteria of 10 CFR § 2.714(a) does not apply to contentions based on information or analysis in documents not previously available and filed promptly after such documents are issued.

4. ALAB-687 - Appeal Board Decision

The Appeal Board held that a Licensing Board is not authorized, for any reason, to admit conditionally a contention that does not meet the specificity

requirements of 10 CFR 2.714(b). Nonetheless, the Appeal Board also held that section 189a. of the Atomic Energy Act precludes the application of § 2.714(b) to bar the later assertion of a new contention founded upon information not in existence or publicly unavailable at the time of the special or prehearing conference due to the schedule established by the Commission. The two principal examples of such "institutional unavailability" are the Final Environmental Statement and Emergency Plan.

The Appeal Board rejected the conditional admission of contentions as contrary to the literal terms and the administrative history of § 2.714. The Appeal Board found that "[n]othing in the terms of Section 2.714(b) explicitly vests a licensing board with the power to admit an unacceptably vague or imprecise contention conditionally, subject to later revision upon receipt of additional information." Rather, "the Section conveys the clear message that, in order to be admitted, the contention must meet the 'requirements of this [Section]'; i.e., it must set forth its bases 'with reasonable specificity.'" ALAB-687, p. 9. The Appeal Board found additional support for its decision in the administrative history of the 1978 amendment to section 2.714, providing petitioners additional time in which to frame issues. According to the Appeal Board, that history precludes any suggestion that the Commission intended an implicit exception to the specificity requirements in circumstances where, because of lack of available information, it is not possible for the petitioner to meet

those requirements at the time its contentions are due. ALAB-687, p. 9. The Appeal Board concluded:

Given the terms and history of Section 2.714a., we are compelled to the conclusion that a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. The Commission might, of course, have chosen to confer such authority to accommodate an existing lack of sufficient available information to enable the petitioner to fulfill these requirements. Instead, the Commission opted for a different procedure. Whether or not in agreement with that election, the adjudicatory boards must respect and abide by it.

ALAB-687, p. 11.

However, the Appeal Board further noted that it does not follow from the foregoing that section 2.714(b) can serve to bar the later assertion of a new contention founded upon information not in existence or publicly available 15 days prior to the special prehearing conference, but which is nonetheless an essential element of the license application or the staff's prehearing review. ALAB-687, p. 11. According to the Appeal Board, "if so interpreted, the Section would sanction an unfair result in contravention of hearing rights conferred by Section 189a. of the Atomic Energy Act." Thus, the Appeal Board held that where information is "institutionally unavailable," good cause for

filing late outweighs all other criteria for considering the admission of late-filed contentions. The Appeal Board found no conflict between its decision and the Commission's direction in § 2.714(b) that there be a balancing of the five § 2.714(a) factors because "of necessity" the balancing of factors must be performed without depriving petitioners of the right to a hearing granted by section 189a. of the Atomic Energy Act.

The Appeal Board found that this holding was implicitly contained in an earlier decision in Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2). ^{7/} In that decision, the Appeal Board had rejected a petitioner's challenge to the legality of the requirement to state specific contentions before discovery. The Appeal Board found that its previous decision was premised on the availability of the necessary information. ALAB-687, p. 13. In this situation, where the requisite information is unavailable due to actions within the Commission's control, the Appeal Board believes that the reasoning of Northern States precludes application of the lateness criteria to exclude a late-filed contention.

True enough, the statutory mandate "does not confer the automatic right of intervention upon anyone"; rather, the Commission may

^{7/} ALAB-107, 6 AEC 188, affirmed CLI-73-12, 6 AEC 241 (1973), affirmed sub nom. BPI v. AEC, 501 F.2d 424 (D.C. Cir. 1974).

condition the exercise of that right upon the meeting of reasonable procedural requirements. BPI v. AEC, supra, 502 F.2d at 428. But no procedural requirement can lawfully operate to preclude from the very outset a hearing on an issue both within the scope of the petitioner's interest and germane to the outcome of the proceeding. If it had that effect, the requirement would not merely be patently unreasonable but, as well, would render nugatory Section 189a. hearing rights. Cf. Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134-35 (1936); United Mine Workers v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977).

ALAB-687, p. 17.

Based on the above analysis, the Appeal Board concluded that "where the nonexistence or public unavailability of relevant documents made it impossible for a sufficiently specific contention to be asserted at an earlier date, that factor must be deemed controlling" and is "not amenable to being overridden by other factors such as that relating to the broadening of the issues."

ALAB-687, p. 17.

Analysis of Appeal Board Decision

1. Conditional Admission of Contentions

2. Application of the Late-Filing
Criteria in § 2.714(a)

The Appeal Board concluded that if a late-filed contention is necessarily based on official documents such as the Final Environmental Statement or Emergency Plan, then that contention cannot be rejected as untimely if it: "(1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination."

Conclusion:

We believe that

Recommendation:

We recommend that

Leonard Bickwit, Jr.
General Counsel

Attachments:

1. Perry unpub. order
2. ALAB-687
3. Draft Order

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Friday, December 3, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Friday, November 26, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for consideration at an Open Meeting during the Week of December 6, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

DISTRIBUTION:

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ATTACHMENT 1

Release

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Peter B. Bloch, Chairman
Dr. Jerry R. Kline
Mr. Frederick J. Shon

In the Matter of

Docket Nos. 50-440-OL
50-441-OL

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

(Perry Nuclear Power Plant, Units 1 & 2)

October 8, 1982

MEMORANDUM AND ORDER
(Concerning Economic Cost Contention)

On August 9, 1982, Ohio Citizens for Responsible Energy (OCRE) moved for permission to late-file a contention concerning "Inadequate Consideration of Economic Consequences of Accidents" in the Draft Environmental Statement (DES) for the Perry Nuclear Power Plant (Perry). Since the relevant sections of the Final Environmental Statement (FES), which has since been issued, are similar to the DES, we will consider the contention to relate to the FES.

This is a late-filed contention that must meet the requirements concerning good cause for late filing. 10 CFR §2.714(a)(1). However, largely because OCRE relies on a recently published study (NUREG/CR-2591) as the basis for its contention, we have determined that this requirement is met. We discuss our reasons for this determination below.

The regulatory requirement that most directly affects the validity of this late-filed contention is the Statement of Interim Policy, "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act," 45 Fed. Reg. 40101 (June 13, 1980). The Statement requires:

Events or accident sequences that lead to [radioactive] releases shall include but not be limited to those that can reasonably be expected to occur. . . . Socioeconomic impacts that might be associated with emergency measures during or following an accident should also be discussed.

Id. at 40103.

OCRE contends that the FES is deficient because it failed to include an assessment of the economic and societal disruption which would occur as a result of an accident at Perry. It uses NUREG/CR-2591, "Estimating the Potential Impacts of a Nuclear Reactor Accident," prepared by the Department of Commerce for the Nuclear Regulatory Commission, to establish that there is available a systematic method for evaluating economic and social disruption and points out that the relevant section of the FES, § 5.9.4.1.4.4, gives only a cursory description of the economic impacts of accidents. (Unlike the Cleveland Electric Illuminating Co., et al., (applicant) we do not consider OCRE's contention to relate only to the failure of the FES to consider the single accident scenario reviewed in NUREG/CR-2591. We interpret OCRE as intending us to consider whether that document provides: (1) a method that should be used, and (2) one example of the use of that method.)

Our review of FES §5.9.4.1.4.4 persuades us that OCRE is in error when it asserts that only a "cursory" treatment has been given to economic consequences of serious accidents. The section describes the use of a complex model to generate a probability/consequence function, presented in Figure 5.8, "Probability distribution of mitigation cost."

However, neither the challenged section nor the filings of the parties shows that a satisfactory method of considering indirect economic effects, similar to that used in NUREG/CR-2591, was used or even considered. As applicant has pointed out, the approach used in the FES is different from that of the NUREG/CR, which estimates economic effects by using an input/output rather than a direct cost approach. Applicant's Answer to OCRE Motion for Leave to File Its Contention 20 (August 31, 1982) at 7. As OCRE

pointed out in its response, the NUREG/CR "analyzes important factors not considered in the [F]ES, e.g., the effect on the larger American economy (in terms of lost vital industries)." OCRE Response at 4.

It is a possible implication of OCRE's contention that the entire probability/cost function in the FES's Figure 5.8, "Probability distribution of mitigation measures cost", should be moved upward and to the right (higher costs at each level of probability) because economic effects such as unemployment have not been properly considered. We have no way of knowing how far the curve might need to be moved, and we therefore do not know how much effect this consideration might have on the overall cost/benefit balance concerning the operation of Perry. (This lack of information also prevents us from following applicant's suggestion and merely amending the FES to accommodate OCRE's contention. Applicant's Answer at 14.)

Good Cause for Late Filing

Both the Staff of the Nuclear Regulatory Commission and the applicant contend that the DES was issued in March 1982 and that the DES's alleged failure to consider economic effects should have been apparent to OCRE at that time--prior to the issuance of the NUREG/CR that OCRE assigns as its good cause for late filing. Although there is some truth to this assertion, we consider it to be an inadequate reason for rejecting this late-filed contention. The publication of the NUREG/CR, which is an authoritative discussion of a method of accounting for previously unanalyzed economic costs, might represent an advance in the application of input/output analysis to nuclear power plants. None of the parties has argued that the technique of the NUREG/CR had been previously applied to nuclear power plants.

Although careful perusal of the DES, armed with the expert knowledge of available economic modeling techniques, might have permitted OCRE to spot the deficiency it now alleges, we do not think so high a standard is to be expected of public intervenors. It is enough that OCRE keep up with current expert literature, as it has recently demonstrated that it is capable of

doing. LBP-82-53, 15 NRC _____ (July 12, 1982), slip op. at 4-5. Consequently, we find that OCRE has shown good cause for late filing. 10 CFR §2.714(a)(1)(i).

We also find that there are no other means now available by which petitioner can protect its interest. Since it was required to comment on the DES prior to the issuance of the NUREG/CR, the opportunity to comment on the DES was not an adequate means to protect its interest, in light of the new information available to it. 10 CFR §2.714(a)(1)(ii).

Our review of OCRE's filings on this contention persuades us that it has demonstrated its competence and its understanding of this issue. We find that it can be expected to assist in developing a sound record. 10 CFR §2.714(a)(1)(iii).

There is no reason to believe that OCRE's interest in this contention would be represented by existing parties. 10 CFR §2.714(a)(1)(iv).

Although this is an additional issue in this proceeding, we do not believe that inclusion of the issue will cause substantial delay. Hence, we find that 10 CFR §2.714(a)(1)(v) is somewhat adverse to admission of the contention.

On balance, after considering the five factors governing the filing of late contentions, we find that the preponderance of the considerations involved favors admitting OCRE's contention.

O R D E R

For all the foregoing reasons and based on consideration of the entire record in this matter, it is this 8th day of October, 1982,

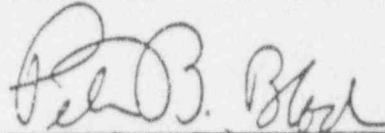
ORDERED

- (1) The following issue is admitted into this proceeding:

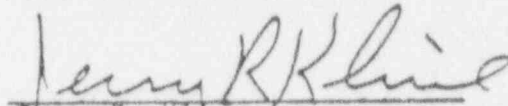
Issue #12. The Final Environmental Statement for the Perry Nuclear Power Plant is deficient because it has not adequately considered the economic effects of serious nuclear accidents, using a technique similar to that used in NUREG/CR 2591.

- (2) Ohio Citizens for Responsible Energy is the lead intervenor on Issue #12.

FOR THE
ATOMIC SAFETY AND LICENSING BOARD



Peter B. Bloch, Chairman
ADMINISTRATIVE JUDGE



Jerry R. Kline,
ADMINISTRATIVE JUDGE



Frederick J. Shon
ADMINISTRATIVE JUDGE

Bethesda, Maryland

ATTACHMENT 2

release

AUG 23 1982

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Thomas S. Moore
Howard A. Wilber

SEP 1 1982

In the Matter of)	
DUKE POWER COMPANY, <u>ET AL.</u>)	Docket Nos. 50-413
(Catawba Nuclear Station,)	50-414
Units 1 and 2))	

Messrs. J. Michael McGarry, III, and Malcolm H. Philips, Jr., Washington, D.C., and William L. Porter and Albert V. Carr, Jr., and Ms. Ellen T. Ruff, Charlotte, North Carolina, for the applicants, Duke Power Company, et al.

Mr. Robert Guild, Columbia, South Carolina, for the intervenor, Palmetto Alliance.

Mr. George E. Johnson for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

August 19, 1982

(ALAB-687)

In its June 30, 1982 order in this operating license proceeding, ^{1/} the Licensing Board referred to us, under 10 CFR 2.730(f), three rulings it had earlier made in acting upon the petitions for leave to intervene filed by the Carolina Environmental Study Group (CESG), the Palmetto

1/ LBP-82-50, 15 NRC ____.

Alliance (Palmetto) and the Charlotte-Mecklenburg Environmental Coalition.^{2/} Those rulings conditionally admitted to the proceeding certain contentions advanced in the CESG and Palmetto petitions, notwithstanding the Board's determination that the contentions did not satisfy the specificity requirements of 10 CFR 2.714(b). Specifically, we are asked to pass interlocutory judgment upon: ^{3/}

- (1) The Board's conditional admission, absent the specificity required by 10 CFR § 2.714, of 10 contentions based on the unavailability of Staff or Applicant documents which might allow the further particularization of the contentions. These contentions were admitted subject to further specification after pertinent documents become available, but the Board ruled that the late-filing criteria of 10 CFR § 2.714(a) would not be applied.
- (2) The Board's conditional admission of six relatively vague contentions, subject to the provision of greater specificity after completion of discovery.

^{2/} LBP-82-16, 15 NRC ____ (March 5, 1982).

^{3/} LBP-82-50, supra, 15 NRC at ____ (slip opinion, p. 14).

- (3) The Board's ruling that the late-filing criteria of 10 CFR 2.714(a) do not apply to contentions based on information or analysis in documents not previously available and filed promptly after such documents are issued. 4/

Acting upon our invitation to all parties, the applicants, NRC staff and one of the intervenors (Palmetto) have filed memoranda addressed to both (1) whether the referral should be accepted; and (2) how the referred rulings should be resolved on the merits. The applicants and staff press for examination and reversal of the rulings at this time. On the other hand, Palmetto opposes interlocutory review; in the alternative, it urges affirmance.

I

A. It is well-settled that we are empowered to decline the acceptance of a Licensing Board referral. Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-405, 5 NRC 1190, 1191 (1977) and cases there cited; Consumers Power Co. (Midland Plant,

4/ The total of sixteen contentions alluded to in the referred questions are, as we understand it, those identified at pp. 2-4 of the applicants' March 31, 1982 motion for reconsideration or certification, in which the staff joined. In an earlier filing, however, the staff identified two additional contentions to which the referred questions also might possibly relate. As will be seen, the precise number of contentions involved is of no present moment.

Units 1 and 2), ALAB-634, 13 NRC 96 (1981). And, as stressed in ALAB-634, it is equally established that

[i]nterlocutory appeals are not favored in Commission any more than in judicial practice. Whether review should be undertaken on "certification" or by referral before the end of the case turns on whether a failure to address the issue would seriously harm the public interest, result in unusual delay or expense, or affect the basic structure of the proceeding in some pervasive or unusual manner.

13 NRC at 99 (footnotes omitted).^{5/}

A ruling that does no more than admit a contention to a proceeding -- whether absolutely or conditionally -- has a low potential for meeting that standard. To be sure, interlocutory review of such a ruling might obviate litigation of the contention and, consequently, accelerate the progress of the hearing.^{6/} This same consideration is

^{5/} 10 CFR 2.730(f) itself makes specific reference to the prevention of "detriment to the public interest or unusual delay or expense".

^{6/} Of course, in the instance of a contention admitted conditionally (whether permissibly or not), there is no assurance that it will be litigated; the Licensing Board may later decide to withdraw its admission. Further, even an unconditionally admitted contention is subject to pretrial summary disposition under 10 CFR 2.749.

present, however, whenever contentions are admitted over objection; thus, it cannot be said that the avoidance of unusual delay is involved. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC ____, ____ (May 17, 1982) (slip opinion, pp. 15-16). ^{7/}

In this connection, it is noteworthy that the Rules of Practice permit an appeal from an order granting an intervention petition only on a claim that the petition "should have been wholly denied." 10 CFR 2.714a(c). Thus, the Commission has explicitly declined to provide an entitlement to obtain interlocutory appellate relief in circumstances where (as here) the complaint is that some, but not all, of the admitted contentions should have been rejected. ^{8/}

^{7/} Many other types of interlocutory orders likewise may slow somewhat the progress of a proceeding. Accordingly, were the potential for some delay sufficient in itself to justify immediate appellate review, little would be left of the general proscription in 10 CFR 2.730(f) against interlocutory appeals.

^{8/} In order to be allowed intervention, a petitioner must advance at least one acceptable contention. 10 CFR 2.714(b). See p. 8, infra.

Nor is there much latitude for a serious claim that the acceptance of a particular contention will have a pervasive effect on the basic structure of the proceeding. To the contrary, it is difficult to see how such a step -- no matter how improvident it might be -- could affect that structure in any material way. This is especially so where the asserted vice of the contention lies simply in its lack of precision.

B. For the foregoing reasons, we are disinclined at this stage of the proceeding to examine each of the contentions in issue here and to make individual determinations on their admissibility. It is our understanding, however, that the Licensing Board has not called upon us to pursue that course. Rather, although arising in the context of specific contentions, the referred rulings appear to pose generic questions. As their formulation by the Board below reflects (see pp. 2-3, supra), these questions go to the circumstances, if any, in which a licensing board may allow the conditional admission of a contention that it has found to fall short of the degree of specificity mandated by 10 CFR 2.714(b). And, as we have been told without contradiction, they have immediate recurring importance but, for practical reasons, will escape appellate scrutiny once the initial decision has issued.

In partial justification of the referral, the Licensing Board alluded ^{9/} to the Commission's Statement of Policy on Conduct of Licensing Proceedings issued last year. That statement exhorts licensing boards to refer or certify promptly to us or the Commission "significant legal or policy question[s] *** on which Commission guidance is needed". CLI-81-8, 13 NRC 452, 456 (1981). The questions at hand are legal in character and, to repeat, have generic implications. Further, insofar as we can determine, they have not previously been squarely addressed on an appellate level.

Because of these considerations, we have decided to accept the referral. This is not to be taken, however, as a repudiation of our general policy disfavoring interlocutory review of licensing board action on specific contentions. That policy remains intact. Indeed, as will be seen, we confine ourselves in this opinion to an interpretation of the governing Rules of Practice. The application of that interpretation to the contentions in issue is left to the Licensing Board.

II

A. Central to our consideration of the referred rulings is 10 CFR 2.714(b), the provision in the Rules of

^{9/} LBP-82-50, supra, 15 NRC at ____ (slip opinion, p. 14).

Practice that is directly concerned with the filing and admission of contentions. That Section reads as follows:

Not later than fifteen (15) days prior to the holding of the special prehearing conference pursuant to §2.751a, or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his petition to intervene which must include a list of the contentions which petitioner seeks to have litigated in the matter, and the bases for each contention set forth with reasonable specificity. A petitioner who fails to file such a supplement which satisfies the requirements of this paragraph with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.

The factors mentioned in the last sentence are the five that govern the grant or denial of untimely intervention petitions:

- (i) Good cause, if any, for failure to file on time.
- (ii) The availability of other means whereby the petitioner's interest will be protected.
- (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.
- (iv) The extent to which the petitioner's interest will be represented by existing parties.
- (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Nothing in the terms of Section 2.714(b) explicitly vests a licensing board with the power to admit an unacceptably vague or imprecise contention conditionally, subject to later revision upon receipt of additional information. Rather, as we read it, the Section conveys the clear message that, in order to be admitted, the contention must meet the "requirements of this [Section]"; i.e., it must set forth its bases "with reasonable specificity". Moreover, the administrative history of the Section precludes any suggestion that the Commission intended an implicit exception to the specificity requirements in circumstances where, because of a lack of available information, it is not possible for the petitioner to meet those requirements at the time its contentions are due.

Prior to 1978, intervention petitions had to set forth both the petitioner's interest and the contentions that it proposed to litigate. 10 CFR 2.714(a),(b) (1978 ed.). Effective May 26, 1978, Section 2.714 was amended to allow the petitioner to defer the filing of contentions until a later date. Under the now prevailing practice, an intervention petition submitted in response to a notice of hearing or opportunity for hearing need only establish the petitioner's interest. 10 CFR 2.714(a)(2). As we have seen, its contentions are to be advanced in a supplement to

the petition, due at least fifteen days prior to the holding of either the special or first prehearing conference. ^{10/}

In the accompanying Statement of Consideration, the Commission explained that the primary consideration underlying the 1978 amendment was that "[e]xperience has indicated that 30 days is often insufficient for potential petitioners to frame and support adequate contentions". 43 Fed. Reg. 17798, 17799 (April 26, 1978). ^{11/} It further explicitly acknowledged that, as "new information * * * comes to light after petitioners have been admitted, such as information in the Commission Staff's safety evaluation or environmental impact statements", there may be occasion to expand or amend contentions. Ibid. On this score, the Statement of Consideration noted that the Commission was "clarifying the requirements in regard to both late filings of petitions and amending, expanding and deleting

^{10/} In an operating license proceeding, a special prehearing conference is mandatory. 10 CFR 2.751a.

^{11/} The reference to that time period was in recognition of the fact that "[c]urrent practice has generally provided 30 days between the date a notice of hearing or notice of proposed action on an application for a nuclear power plant construction permit or operating license is published in the FEDERAL REGISTER and the last day for filing of timely petitions for leave to intervene". 43 Fed. Reg. at 17799.

contentions" by making the acceptability of such action subject to a balancing of the five Section 2.714(a) factors. Ibid.

Given the terms and history of Section 2.714(a), we are compelled to the conclusion that a licensing board is not authorized to admit conditionally, for any reason, a contention that falls short of meeting the specificity requirements. The Commission might, of course, have chosen to confer such authority to accommodate an existing lack of sufficient available information to enable the petitioner to fulfill those requirements. Instead, the Commission opted for a different procedure. Whether or not in agreement with that election, the adjudicatory boards must respect and abide by it.

B. It does not follow from the foregoing that Section 2.714(b) can serve to bar the later assertion of a new contention founded upon information not in existence or publicly available 15 days prior to the special prehearing conference, but which is nonetheless an essential element of the license application or the staff's prehearing review. Indeed, if so interpreted, the Section would sanction an unfair result in contravention of hearing rights conferred by Section 189a. of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2239(a).

1. In Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC

188 (1973), affirmed CLI-73-12, 6 AEC 241 (1973), affirmed sub. nom. BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974), we rejected the petitioners' challenge to the legality of the contentions requirement in light of Section 189a. of the Act. One of the prongs of the challenge was that it was not possible for petitioners "to state specific contentions until after they have been permitted to intervene and to avail themselves of discovery procedures".^{12/} Our principal response was that "there is abundant information respecting the particular facility available to the public at the time of the publication of the notice of hearing or of an opportunity for hearing -- including at least the applicant's detailed safety analysis and environmental reports". 6 AEC at 192. ^{13/}

^{12/} At that time, intervention petitions had to set forth contentions as well as establish the petitioner's standing. See p. 9, supra. In addition, then as now, discovery on the subject matter of a contention could be obtained only after the contention had been admitted to the proceeding. 10 CFR 2.740; Wisconsin Electric Power Co. (Point Beach Nuclear Plant, Unit No. 2), ALAB-31, 4 AEC 689, 690-91 (1971).

^{13/} In an accompanying footnote, we elaborated upon this point (with particular reference to the content of the central (Washington, D.C.) and local public document rooms).

Implicit in this observation was the belief that an intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention. Stated otherwise, neither Section 189a. of the Act nor Section 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or staff. Nothing that has transpired since Prairie Island was decided prompts us to reconsider that view. To the contrary, the fact that, in the interim, the Commission has seen fit to put off the filing of contentions until the virtual eve of the prehearing conference lends additional support to what we there concluded.

But equally implicit in the Prairie Island treatment of the specificity requirements was the assumption that, prior to the special prehearing conference, the documentation necessary to fashion an adequately particularized contention both has come into existence and is available to a potential intervenor upon diligent search. For a petitioner can scarcely be expected to forecast the content of documents that it has not examined and cannot examine because they have not yet surfaced. In short, in order to put forth a specific contention respecting, for example, the adequacy of

an environmental impact statement or an emergency plan, one must have had the opportunity to examine the statement or plan. Indeed, without that opportunity, it is not possible for a petitioner even to determine whether there is warrant for a contention on the subject -- i.e., whether the impact statement or emergency plan is open to a claim of insufficiency on some colorable ground. 14/

2. With these considerations in mind, we turn to the question of precisely how a licensing board is to deal with the circumstance that, at the time of the special prehearing conference, one or more documents bearing directly upon the licensing action in issue have not as yet come into existence or become publicly available.

14/ In this connection, we summarily reject the suggestion in the applicants' memorandum to us (at pp. 41-42) that a sufficiently specific contention regarding emergency planning for Catawba can be founded upon (1) the Commission's regulations and regulatory guides; (2) already available generic North and South Carolina state plans; and (3) existing emergency plans for other facilities in those two States. There is likewise no merit to the staff's similar argument (at p. 18 of its submission) that an intervenor can ascertain whether the staff has properly fulfilled its role in the discharge of this agency's responsibilities under the National Environmental Policy Act by examining the applicants' environmental report. (We do not, of course, reach the question whether the availability of the environmental report or other materials might trigger an obligation to file environmental contentions not directed to the adequacy of the staff's performance of its NEPA responsibilities.)

At the outset, we note a possible inconsistency between Section 2.714(b) as written and the underlying Statement of Consideration with respect to when a licensing board is to make its determination on allowing new contentions grounded upon previously unavailable information. For its part, the Section authorizes the board to grant "[a]dditional time for filing the supplement" based upon a balancing of the Section 2.714(a) factors. This language means that, prior to the deadline for the supplement, on an adequately supported motion the board may extend that deadline either as to certain or all possible contention subjects. Thus, for example, a petitioner might be required to file a timely supplement setting forth those contentions as to which sufficient information already existed but given leave to await the subsequent release of the emergency plan before putting in (by way of further supplement) any contentions it might have with regard to the plan. ^{15/} On the other hand, the Statement of Consideration seems to suggest a Commission contemplation that, instead of granting additional time in advance, the board will take no action until the new contention is actually filed and then will look to the

^{15/} If the petitioner represented to the board that the only matters it might wish to put into controversy related to the as yet unavailable emergency plan, then the obligation to file any supplement might be deferred pending the plan's release.

Section 2.714(a) factors in deciding whether to entertain it. See 43 Fed. Reg. at 17799.

Obviously, the wording of a regulation generally takes precedence over any contradictory suggestion in its administrative history. In any event, as we see it, irrespective of when a licensing board is called upon to act, as a matter of law a contention cannot be rejected as untimely if it (1) is wholly dependent upon the content of a particular document; (2) could not therefore be advanced with any degree of specificity (if at all) in advance of the public availability of that document; and (3) is tendered with the requisite degree of promptness once the document comes into existence and is accessible for public examination.

We perceive no conflict between this conclusion and the Commission's direction in Section 2.714(b) that there be a balancing of the five Section 2.714(a) factors. Of necessity, the Commission intended that balancing to be performed in obedience to the proviso in Section 189a. of the Atomic Energy Act that, in proceedings of this type, it "shall grant a hearing upon the request of any person whose interest may be affected by the proceeding." True enough, the statutory mandate "does not confer the automatic right of intervention upon anyone"; rather, the Commission may condition the exercise of that right upon the meeting of reasonable procedural requirements. BPI v. AEC, supra, 502

F.2d at 428. But no procedural requirement can lawfully operate to preclude from the very outset a hearing on an issue both within the scope of the petitioner's interest and germane to the outcome of the proceeding. If it had that effect, the requirement would not merely be patently unreasonable but, as well, would render nugatory Section 189a. hearing rights. Cf. Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134-35 (1936); United Mine Workers v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977).

In sum, in the instance of a contention that was susceptible of filing within the period prescribed by the Rules of Practice, the determination whether to accept it on a untimely basis involves a consideration of all five Section 2.714(a) factors -- and not just the reason (substantial or not as the case may be) why the petitioner did not meet the deadline. See Statement of Consideration accompanying amended Section 2.714(b), supra, 43 Fed. Reg. at 17799, citing Nuclear Fuel Services, Inc. (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273 (1975). Where, however, the nonexistence or public unavailability of relevant documents made it impossible for a sufficiently specific contention to have been asserted at an earlier date, that factor must be deemed controlling; it is not amenable to being overridden by other factors such as that relating to the broadening of the issues. As scarcely requires further extended discussion, any different result

would countenance placing the petitioner in a classic "catch-22" situation ^{16/} -- which, once again, the statute forbids and our regulations cannot be thought to have authorized.^{17/}

^{16/} The Licensing Board itself noted this fact. See LBP-82-16, *supra*, 15 NRC at ____ (slip opinion, p. 6). The Board further, and correctly, pointed out that a rule allowing the rejection on untimeliness grounds of a contention that could not have been earlier filed because of the nonavailability of applicant-sponsored documents would encourage applicants to delay the completion of those documents. *Id.* at ____ (slip opinion, pp. 9-10). The same might be said with regard to staff documents such as the environmental impact statement.


^{17/} To avoid possible misunderstanding, we stress anew that both the Licensing Board's rulings and the above discussion are in the context of the unavailability of documents associated with the license application and the staff's prehearing review thereof (e.g., the applicant's emergency plan and the staff's environmental impact statement). An intervenor's endeavor to inject a belated contention grounded upon newly acquired information not so associated (such as a just-executed affidavit asserting for the first time quality assurance deficiencies during the construction of the facility) is an entirely different matter.

It is also worthy of reemphasis that the referred rulings likewise do not embrace any Licensing Board determination respecting (1) whether a particular submitted contention was specific enough to satisfy the Section 2.714(a) requirements; or (2) whether there was sufficient publicly available information to enable the formulation prior to the prehearing conference of an adequate contention on a particular subject. In any event, as previously observed, determinations of that stripe are not suitable candidates for an interlocutory appellate review.

The referral is accepted and the cause is remanded to the Licensing Board for reconsideration of LBP-82-16 and LBP-82-50 in light of the views expressed in the foregoing opinion.

It is so ORDERED.

FOR THE APPEAL BOARD


C. Jean Shoemaker
Secretary to the
Appeal Board

ATTACHMENT 3